

FIRST AMERICAN TITLE INSURANCE CO.

IBLA 85-611

Decided December 16, 1987

Appeal from a decision of the Acting Director, Bureau of Land Management, dismissing protest of a dependent resurvey and accretion lands survey.

Set aside and referred for hearing.

1. Rules of Practice: Appeals: Burden of Proof--Surveys of Public Lands: Generally--Surveys of Public Lands: Dependent Resurveys

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

2. Administrative Procedure: Hearings--Hearings--Rules of Practice: Hearings--Surveys of Public Lands: Dependent Resurveys

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

APPEARANCES: Donald B. Davidson, Santa Ana, California, for appellant; James P. Kelley, Chief, Branch of Cadastral Survey, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

First American Title Insurance Company (First American) has appealed from a February 19, 1985, decision of the Acting Director, Bureau of Land Management (BLM), dismissing its protest of a dependent resurvey and accretion lands survey of T. 17 N., R. 22 W., Gila and Salt River Meridian, Arizona, accepted on September 16, 1982. Specifically, First American objects to the method adopted by BLM in establishing the partition line which apportions accreted lands west of secs. 10 and 15, T. 17 N., R. 22 W.

Townships 17 and 18 N., R. 22 W., were surveyed by John J. Fisher, Deputy Surveyor, in 1905, as shown by the respective plats approved June 29, 1906. This survey established meander corners along the Colorado River as it then existed. The meander line passed through both secs. 10 and 15 giving them a riparian boundary. Subsequent to the 1905 survey, the Colorado River moved westward as the result of accretion, 1/ so that considerable areas of land were added to the riparian sections as originally surveyed. The Bureau of Reclamation rechanneled the Colorado River in the early 1950's, moving the bank of the Colorado River further westward. 2/

First American insured title to certain of these accreted lands in T. 17 N., R. 22 W., in 1975 and 1976. A series of four policies issued by First American in 1975 and 1976 contain property descriptions which situate the lands covered by those policies in sec. 15, T. 17 N., R. 22 W. In warranting that the subject lands were located in sec. 15, First American relied upon "the division of accretion line" established by BLM in the early 1960's. The survey alluded to by First American was conducted by Norville Shearer, BLM project engineer, in 1961-62. In establishing the partition line between secs. 10 and 15, called "the division of accretion line" in First American's policy, Shearer followed the method referred to in the 1973 Survey Manual and other authorities as the "proportionate method." Simply stated, the proportionate method of dividing accreted lands involves "proportioning the new frontage in the same ratio as the frontage along the old shore as outlined in the case of Johnston v. Jones, 66 U.S. 117 (1861)." 1973 Survey Manual § 7-66 at 172. Shearer established the bearing of the line partitioning the accreted lands between secs. 10 and 15 at S. 49 degrees 43' W., with the result that the lands involved in this appeal were determined to be accretions to sec. 15.

Shearer did not complete the work of resurveying Tps. 17 and 18 N., R. 22 W.. His efforts were interrupted by litigation involving rights to accreted lands west of secs. 27, 28, 33, and 34, T. 18 N., R. 22 W., which culminated in the Ninth Circuit ruling in Sherrill v. McShan, 356 F.2d 607 (9th Cir. 1966). The relevance of Sherrill v. McShan will be subsequently considered in this opinion.

In 1982, Paul L. Reeves, cadastral surveyor, resumed the project of surveying the accreted lands west of T. 17 N., R. 22 W. He did not apply the proportionate method in partitioning the accreted lands west of secs. 10 and 15, but rather adopted a partition line, surveyed by Nelson Myer, a private land surveyor, in 1961, which is normal or perpendicular to the Colorado River. The bearing of that partition line, as reflected on the plat approved by BLM in 1982, is S. 31 degrees 09' W., which situates the accreted lands insured by

1/ The Glossary of BLM Surveying and Mapping Terms (1978) defines the term "accretion" as "the gradual and imperceptible addition of soil or other material by the natural processes of water-borne sedimentation or by the action of currents against shores and banks."

2/ See Memorandum to File dated June 4, 1962, by Norville Shearer, project engineer for the Lower Colorado River Cadastral Survey project to be completed in accordance with Special Instructions dated Dec. 1, 1961.

First American in sec. 10, rather than in sec. 15. The result is that the approved 1982 resurvey places the lands insured by First American in the Fort Mohave Indian Reservation.

By letter to BLM dated July 19, 1984, First American objected to the approval of the 1982 dependent resurvey and accretion survey, as "creat[ing] serious land title problems on the Arizona side of the Colorado River." Specifically, First American stated that "[t]he change in the bearing of one line of accretion which differs from the line of accretion on the map of an unapproved resurvey made by [Norville Shearer of] the Bureau of Land Management in the 1960's does create a problem. The two maps appear to be identical in every other respect." (Emphasis in original.) In an additional letter, dated November 30, 1984, Donald Davidson, on behalf of First American, stated that "there is no single concrete rule for apportioning accretion. * * * It is my opinion that the surveyor changed the line to fit the west boundary of Bermuda Plantations [3/] not realizing the disastrous effect on long established land titles."

The Deputy Director, BLM, responded to First American's objections by letter dated December 20, 1984. The reason given for establishing the partition line as shown on the approved 1982 plat is as follows:

One of the several changes reflected in the 1982 approved survey from the unapproved survey of 1962 was the change in bearing of the line of accretion between sections 10 and 15. This line, as shown on the 1962 survey, could not have been accepted and should be considered incorrect, since the basis for it had been rejected by the U.S. District Court of Arizona in 1977. [4/] The line of accretion, determined by Nelson E. Myer, Registered Land Surveyor No. 4341, as normal or at right angles from the Colorado River at the time he surveyed in 1961, was accepted as the boundary between the Fort Mojave Indian Reservation and the Bermuda Plantation by the BLM.

By letter of January 10, 1985, First American complained that BLM, in its December 20, 1984, letter, "really did not give a logical reason for

3/ The "Bermuda Plantations" are comprised of approximately 700 lots on the accreted lands west of sec. 15, T. 17 N., R. 22 W. The private survey conducted by Nelson Myer in 1961 established a partition line between secs. 10 and 15 perpendicular to the Colorado River; this line would serve as a common boundary between the Bermuda Plantations and the Fort Mohave Indian Reservation.

4/ By order dated Aug. 27, 1987, the Board directed, inter alia, that BLM provide a citation to this 1977 decision. In its response, received by the Board on Oct. 1, 1987, BLM stated that its prior reference to a 1977 district court opinion was erroneous. It appears instead that BLM meant to cite to an Aug. 17, 1964, district court order subsequently affirmed in Sherrill v. McShan, supra.

changing the bearing of just one line of accretion." In its January 10, 1985, letter, First American raises legitimate questions about BLM's response. First American asserts that the private survey by Nelson E. Myer was never recorded in Mohave County, Arizona, and asks why the partition line shown on a private survey was adopted rather than the partition line established by Shearer, BLM's project engineer, in 1962.

The Acting Director, BLM, by letter dated February 19, 1985, responded to First American's objections, stating: "The letter dated December 20, 1984, from this office to you is our final administrative action on this case. Since no new pertinent facts were given subsequent to this letter, we are dismissing your claim that the Bureau of Land Management (BLM) erred in its survey procedure." In his letter, the Acting Director, BLM, refers First American to the regulations at 43 CFR Part 4, "relating to an appeal from this dismissal."

In its statement of reasons (SOR) for appeal, First American reiterates the objection made earlier:

There are various methods for apportioning accretion depending upon the character of the shoreline. In this case, the shoreline slightly curved so the applicable, approved method was to delineate the line of accretion normal (perpendicular) to a tangent to a point on the curved shoreline. Therefore, it is possible to have more than one line of accretion normal to a curved shoreline from the same meander corner so both the 1962 and 1982 lines of accretion were technically correct.

(SOR at 3). First American argues that adopting the partition line shown on the approved 1982 plat disrupts the bona fide rights of private landowners, whereas the 1962 partition line would preserve them.

In a memorandum dated April 26, 1985, to the Director, BLM, the Chief, Branch of Cadastral Survey, Arizona, provides the following response to First American's criticism:

Mr. Davidson [Chief Civil Engineer, First American] advocates keeping the 1962 temporary line. * * * [H]e asks how BLM can change the 1936 line. There can be only one line to divide the accretion between sections 10 and 15. Nelson Myer surveyed that line in 1961 when he surveyed the accretion to section 15 as Bermuda Plantations. The river was channelized by that time and the partition lines fixed in position. The BLM 1982 survey accepted that line as having been established in accordance with the requirements of the Manual of Surveying Instructions, 1973.

In an attempt to clarify First American's premise that "it is possible to have more than one line of accretion normal to a curved shoreline from the same meander corner so both the 1962 and 1982 lines of accretion were technically correct" (SOR at 3), the above memorandum noted: "The 1962 line was based on a proportionate measurement. The approved survey adopted the Myer line which was approximately normal to the river" (BLM Memorandum dated Apr. 26, 1985, at 2).

The general rule for apportionment of accreted lands is set forth in the 1973 Survey Manual at page 172: "Apportionment of the accreted lands is usually made by proportioning the new frontage in the same ratio as the frontage along the old shore as outlined in the case of Johnston v. Jones, 66 U.S. 117 (1861), discussed in sections 7-58 and 7-61." (Emphasis added.) Section 7-58 of the 1973 Survey Manual at pages 168-69 contains instructions for apportioning the bed of a river. Section 7-58 provides in relevant part:

Instructions for surveying the partition lines are found in ["Rule for Establishing Boundaries of Riparian Claims in the North Half of the Bed of Red River, Oklahoma,"] 50 L.D. 216 (1923), in the syllabus:

In establishing the side boundaries of claims of riparian proprietors to the area between the original meander line on the north and the medial line of Red River in Oklahoma in accordance with the decisions of the Supreme Court in the case of Oklahoma v. Texas, lines should be run from points representing the limits of frontage of the original claims on the meander line to points on the medial line at distances thereon proportionate to the lengths of frontage of the respective abutting owners.

This is an adaptation of the rule outlined in the case of Johnston v. Jones, 66 U.S. 117 (1861). By that rule the new frontage along the water boundary of an accreted area was apportioned in the same ratio as the frontage along the ancient bank.

(1973 Survey Manual § 7-58 at 168).

The Supreme Court in Johnston v. Jones specifically delineated the steps to be followed in establishing partition lines between claims to accreted lands:

"The rule is: 1, to measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; 2, the next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old. When, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined, as the points of division on the newly formed shore. The new lines thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals, or exceeds, or falls short of the old." [Emphasis in original.]

66 U.S. at 123, quoting Deerfield v. Arms, 34 Mass. (17 Pick.) 45, 46 (1835).

Thus, Johnston v. Jones embodies the "usual" rule to be applied in establishing partition lines between riparian claims to accreted lands. Moreover, in Public Land Surveying - A Casebook (1975), prepared by BLM's Cadastral Training Staff, the "proportionate shoreline method" is described as "[t]he method used by the Federal Government, wherever possible, and by a majority of the states * * *". This method is outlined in Johnston v. Jones and recommended by the Manual of Surveying Instructions, 1973, sections 7-58 to 7-67." Public Land Surveying - A Casebook (1975), at D 1-2 (emphasis added).

The 1973 Survey Manual, however, at section 7-59, describes an "alternate method" for establishing partition lines between claims to the bed of a river. Section 7-59 provides as follows:

An alternate method is to run each partition line normal to the median line. This method awards to each riparian lot the area immediately in front of it. Where a winding stream course causes the normals to deflect rapidly, more than one normal can sometimes be extended from a single point on the shore, or perhaps no suitable normal can be drawn. A combination of methods may then have to be used to obtain equitable results. For instance, normals might be drawn to the median line at straight parts of the river, and the intermediate parts apportioned along the median line.

(1973 Survey Manual § 7-59 at 169).

Paul Reeves adopted the partition line between secs. 10 and 15 which was drawn by Nelson Myer in 1961; that line was established in accordance with this "alternate method."

In 1961 and 1962, Norville Shearer, project engineer for the Lower Colorado River Cadastral Survey project, began the resurvey and accretion lands survey in Tps. 17 and 18 N., R. 22 W., as requested on May 22, 1961, by the Commissioner, Bureau of Indian Affairs (BIA). The Special Instructions for this survey project, dated December 1, 1961, provided, with regard to establishing partition lines between claims to the accreted lands:

The old left bank of the Colorado River, in front of the lands of interest, as it existed at time of the rechannelization [in 1952] will be identified as can best be done at this time from extant evidence or historical mapping. This bank will be accurately traversed for determination of its distance between terminal points. This traverse, in turn, will then be apportioned by segments in direct ratio to opposing proportionate parts of the original meander line.

Partition lines will be surveyed across the added lands from the original meander corners to the respectively determined proportion points on the old bank, by extension of the section lines. The traverses of the old bank, in front of public lands, will be held and considered as limiting boundaries of those lands.

A memorandum to the file from Norville Shearer, dated June 4, 1962, states that the projected surveys within Tps. 17 and 18 N., R. 22 W., were not completed during the 1961-62 survey season due to the "intervention of the defendant parties" in litigation (Sherrill v. McShan, supra). As stated earlier, Shearer never completed this survey project. This memorandum also outlines the work yet to be done to complete the survey, with specific reference to the partition line between secs. 10 and 15, which is the focus of this appeal. All original surveys of "[t]he division lines across the added lands * * * bet. secs. 10 and 15, T. 17 N., R. 22 W., have been run and meander corners on the considered position of the old left bank of the river, as it ran prior to rechannelization in the 1950's have been established." (Emphasis in original.) The partition lines were to have been established according to the following procedures, which comport with Johnston v. Jones:

Following the running of this old bank line, it will be divided in ratable parts in direct relation to the respective portions of the record meander lines in front of secs. 10, 9, 4 and 33. That is, that part of the bank in front of sec. 10 will be to the whole of the new traverse as the record meander lines of secs. 10, 9, 4 and 33 (257.92 chs.), etc., for each portion. This will then give known distance points on the traverse for each proper new meander corner and the appropriate course and distance of each division line can be calculated.

(Memorandum to File from Norville Shearer, dated June 4, 1962, at 2).

The Shearer survey was never approved by BLM. According to a memorandum dated June 26, 1968, from the Acting Regional Solicitor, Los Angeles Region, to the Deputy Solicitor, Shearer acknowledged that the Ninth Circuit's decision in Sherrill v. McShan "cast doubt on the validity of the survey and only a new engineering study could determine if any part of the survey could still be used or relied upon." The doubt generated by Sherrill v. McShan relates to the "zero accretion point" or the "northerly reference point" from which Shearer measured the new meander line. In Sherrill v. McShan, the Ninth Circuit affirmed the decision of the District Court of Arizona, dismissing the action for lack of subject matter jurisdiction, on the rationale that the lands involved were located in California. This ruling reflected the determination by the District Court of Arizona that the lands involved did not result from accretion but from avulsion, 5/ and consequently the boundary between Arizona and California rested in the middle of the channel at it existed in 1912. Thus, the lands west of the middle of that channel were California lands. Shearer's survey established a "zero accretion point" in sec. 28, which was among the lands determined by the District Court of Arizona to have resulted from avulsion rather than accretion.

5/ The Glossary of BLM Surveying and Mapping Terms (1978) defines the term "avulsion" as "[a] river's sudden change in flow alignment out from its previous left and right banks to a new channel, leaving an identifiable upland area between the abandoned channel and the new channel."

The December 20, 1984, decision of the Deputy Director, BLM, states that the partition surveyed by Shearer could not have been accepted, "since the basis for it had been rejected by the U.S. District Court of Arizona in 1977." The casefile contains a memorandum dated July 7, 1982, in which the Associate Solicitor, Division of Indian Affairs, explained to the Director, BLM, that subsequent to the Ninth Circuit decision in Sherrill v. McShan, the Fort Mohave Tribe brought a quiet title action in the District Court of the District of Arizona (Ft. Mohave Tribe v. LaFollette, No. Civ 69-324 MR (1977)). The Associate Solicitor indicates that the subject of this action was portions of sec. 4, T. 17 N., R. 22 W., and sec. 34, T. 18 N., R. 22 W., which land the tribe claimed under Executive Order. The Associate Solicitor's memorandum continues:

The suit was settled by the Tribe paying \$1,260,000 for quitclaim deeds from adverse claimants whose title derived from California patents in portions of sections 4, 7, and 34, sections 6 and 33 in their entirety, and sections 1 and 12 east of the present river channel. The present survey request extends north only as far as the south boundary of this purchase. Thus, the ruling of Sherrill v. McShan is only indirectly related to the present survey.

(Memorandum from Associate Solicitor, Division of Indian Affairs, to Director, BLM, dated July 7, 1982, at 5). The Associate Solicitor concluded BLM is not precluded by the litigation from accepting the "zero accretion point" established by Shearer for the limited purpose of establishing the partition line between the accretion lands west of secs. 10 and 15.

Even if the recommendation of the Associate Solicitor, Division of Indian Affairs, is unacceptable because Shearer's "zero accretion point" is located in lands formed by avulsion rather than accretion, the question arises as to why the zero accretion point may not be established south of the area litigated in Sherrill v. McShan. Further, although the ruling of the Ninth Circuit in Sherrill v. McShan might be read as invalidating the partition lines established by Shearer, 6/ we see no reason to read it as invalidating the method which Shearer used.

By contrast with the rather detailed Special Instructions for completing the 1962 survey conducted by Norville Shearer, the Supplemental Special Instructions dated January 25, 1980, contain no reference to the method to be used in partitioning the accretion lands west of secs. 10 and 15. Moreover, the file contains no explanation as to why Paul Reeves established the partition line perpendicular to the river, except that he followed the 1961 line surveyed by Myer, whose technique is also unexplained.

6/ The recent opinion of the Ninth Circuit in Wildman v. United States, ____ F.2d ____ (1987), (No. 86-2518, filed Sept. 14, 1987) clarifies that its 1966 opinion in Sherrill v. McShan did not constitute an adjudication of land title. Slip op. at 11.

[1, 2] In Peter Paul Groth, 99 IBLA 104, 111 (1987), the Board ruled that in reviewing a survey after the official filing of the plat, the party challenging the resurvey must establish by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous. In Groth, the Board ruled that deviation from the "primary method" for the restoration of lost corners, as set forth in the BLM Survey Manual, without "proper justification," constitutes gross error.

In an order dated August 27, 1987, the Board concluded, based upon the record then before it, that BLM had failed to "provide justification for why it did not base the 1982 partition line on a proportionate measurement" (Order dated Aug. 27, 1987, at 4). This order, which directed BLM to explain its deviation from the proportionate method of establishing partition lines across accreted lands, provided as follows:

The 1973 Survey Manual states that the "proportionate method" of establishing partition lines across accreted land is the "usual" method, and describes the approach used by Paul Reeves in establishing the partition line as the "alternate" method. In our view, deviation from the "usual" method of establishing the partition line involved herein must be supported by cogent justification. There is no explanation in the record for the departure from the usual method of establishing partition lines across accreted land.

Accordingly, on or before 30 days from receipt of this order, BLM is directed to show cause why the partition line between the accreted lands west of secs. 10 and 15 should not be established in accordance with the proportionate method defined in the 1973 Survey Manual.

(Order dated Aug. 27, 1987, at 8). BLM responded to the order by letter dated September 28, 1987, which was received by the Board on October 1, 1987. In its response, BLM explains that its alternate method was based in part upon the unacceptability of Shearer's northerly zero accretion point.

BLM explains its reason for rejecting Shearer's northerly zero accretion point as follows:

Shearer's northerly zero accretion point (A) was determined to be unacceptable because it is within the area determined by the court in Sherrill v. McShan to have been avulsed [7/] (the so called "Goat Island Avulsion") in 1912, and (A) is not on the

7/ In Sherrill v. McShan, the Ninth Circuit affirmed the findings by the district court that during 1884 through 1912, the Colorado River "slowly moved east opposite [what later came to be known as the Goat Island area] by the process of erosion and deposition known in law as accretion." 356 F.2d at 609. However, during the period 1912 through 1935, the course of the river "did not change its channel by creeping over the lands between the

last natural bank before the avulsion. A zero accretion point must be either at a point where accretion stops or at a place where the ancient bank and the bank limiting the accretion have similar characteristics in direction, such as at the south end of section 15, where a normal can be used. It can't be beyond where the accretion has stopped because you then don't have a comparable new frontage to proportion against the ancient bank.

Shearer had erroneously determined (according to Sherrill v. McShan) the movement at this point to be by erosion and accretion rather than avulsion. We still do not know whether the Sherrill v. McShan conclusion is inaccurate. See Wildman et al. v. United States et al., No. 86-2518 (9th Circuit 1987).

(BLM's Response to Order at 2).

According to BLM, the absence of a satisfactory northerly zero accretion point resulted in its consideration of alternate methods. BLM explains as follows:

When we could find no northerly zero accretion point which seemed satisfactory, we turned to alternate methods. We could find no solution which would grant all the parties all the land they claimed. Every solution caused conflict with someone. Something had to give. The official B.L.M. survey, as accepted, caused the Fort Mojave Indian Tribe to suffer deficiency from their expectations as well as the private claimants.

The most obvious alternate method was to use a normal. The 1905 meander line and the pre-channelized left bank have a similar general direction with no sharp bends in this reach. Running normals results in each section having the accretion in front of it as is required by Manual Section 7-57. We determined that this would be appropriate in this reach of the river.

(BLM Response to Order at 3).

On October 22, 1987, First American filed its response to BLM's September 28, 1987, letter, arguing that BLM's emphasis on the effect of Sherrill v. McShan is misplaced. According to First American, the case "is of no consequence and is not applicable to the problem created by the change in bearing of the partition line" (First American Response at 4).

fn. 7 (continued)

eastern and western channels, as they existed in 1912, but by a change in flow of the River so that it ran in the western channel around such lands." Id. In other words, the Goat Island area was formed by avulsion. Thus, riparian rights in this case must be defined with reference to the 1912 channel, since the avulsion which took place after 1912 did not alter those rights.

First American points to the following paragraph from Shearer's April 6, 1962, letter to support its argument that Shearer considered only the portion of the river south of the Goat Island area in establishing the partition line between secs. 10 and 15.

Having satisfied myself that all considered changes in the river's position, within the area of interest, had occurred through normal processes of erosion and accretion, and not through avulsive changes, a plan of division of the accreted lands which had attached to the left bank of the river subsequent to the original surveys in Arizona was devised. This plan was based upon a ratable division of the left bank of the Colorado River, as it existed at the time of rechannelization, in direct proportion to the record meander lines for each section as originally surveyed. The last diagram in the accompanying maps depict[s] the riparian sections reserved to the Mohave Indians and the considered extent of the accretion lands inuring to each.

First American argues that this paragraph "applies only to the naturally accreted area south of Section 4 and not to the area of Goat Island which Shearer knew was an avulsion" (First American Response at 5). In this April 6, 1962, letter, Shearer states that he did not "extend proportioning across lands currently involved in the Sherrill v. McShan litigation." Shearer, argues First American, was not prohibited from apportioning the accretion lands south of Goat Island because there was no pending litigation affecting those lands.

We agree with First American's contention that Shearer was not prohibited from apportioning the accretion lands south of Goat Island. However, as Shearer himself acknowledged, the work he did is questionable to the extent that he took into account lands formed by avulsion in the Goat Island area in determining the amount of new frontage to be assigned on a proportionate basis to corresponding portions of the 1905 meander line. 8/

In the field notes to the 1982 survey, Paul Reeves states that "[t]he division of accretion lines established by [Leonard W.] Murphy and

8/ In a memorandum dated June 26, 1968, to the Deputy Solicitor, the Acting Regional Solicitor, Los Angeles Region, quoted from an earlier reply from his office to an inquiry concerning the status of the lands involved herein:

"We are further informed that the northerly reference point used [in the Shearer survey] is in conflict with the decision * * * in [Sherrill v. McShan] * * *. Only a new engineering study and possibly a new survey would indicate whether the accretion lands in the Section 9 area would have to be apportioned in a manner different from that shown on the preliminary plat because of the doubt the Court decision places upon the validity of the northerly reference point." (BLM Memorandum dated June 26, 1968, at 6).

[Donald A.] Cannon, between section 4 and 9, and between sections 9 and 10, were based on a proportionate division of accretion and were used to describe land to which title was quieted in *River Farms vs. Fountain*, 21 Arizona Appeals 504, 520 P.2d, 1181 (1974)." Reeves accepted "[t]hese divisions of accretion lines * * * in these survey." Reeves' acceptance of the partition lines between secs. 4 and 9, and between secs. 9 and 10, based upon the proportionate method, places into question BLM's refusal to use that same method in establishing the partition line between secs. 10 and 15. BLM does not explain this inconsistency.

Based upon the record before us, we cannot find that BLM has provided adequate justification for departing from the proportionate method in partitioning the accreted lands west of secs. 10 and 15. The record presents unresolved questions of fact concerning whether there are adequate reasons for departing from the proportionate method, which is the "usual" or "recommended" method of apportioning accreted lands. Accordingly, pursuant to 43 CFR 4.415, BLM's decision denying First American's protest of the 1982 dependent resurvey and accretion lands survey is set aside and the case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment of an Administrative Law Judge to conduct a hearing on the question of whether BLM's departure from the proportionate method of surveying accreted lands is supported by adequate justification. If there is no such justification, the Administrative Law Judge shall remand the case to BLM for action consistent with his decision. The decision of the Administrative Law Judge shall be final for the Department in the absence of a timely appeal therefrom to this Board.

In addition, we note that the record does not indicate that the Fort Mohave Indian Tribe (Tribe) has been a participant in these proceedings. As an interested party, the Tribe should be given notice of and an opportunity to participate in the hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision denying First American's protest is set aside and this matter is referred to the Hearings Division for hearing and decision. The Administrative Law Judge is requested to give expedited consideration to this matter.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

